Supreme Court, U.S.
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No. 93-

In The

Supreme Court of the United States

October Term, 1993

DR. KATHLEEN JOHNSON WU,

Petitioner,

v.

UNIVERSITY OF ALABAMA BOARD OF TRUSTEES; MAX HOCUTT, ROGERS S. SAYERS; RICHARD PECK; JOHN FORMBY; JAMES YARBROUGH; JAMES G. TAAFFE; BILLY HELMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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March 1, 1994

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Questions Presented For Review

1. Does Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, clearly prohibit an employer's intentional non-economic retaliation through creation of a hostile environment for an employee who has made previous claims of sex discrimination?

2. If an individual defendant intentionally retaliates against an employee for having made a previous civil rights complaint and does so by creating a hostile employment environment but not by causing the employee to suffer financially, does this individual defendant, sued in his personal capacity, enjoy qualified immunity protection when sued under 42 U.S.C. § 1983 for enforcement of rights secured to the employee by Title VII of the Civil Rights Act of 1964, as amended, and First Amendment to the United States Constitution?

Parties

The parties in the court of appeals were Dr. Kathleen Johnson Wu and Dr. Hsiu Kwang Wu, appellants, and the Board of Trustees of the University of Alabama, a body corporate; Dr. John Formby, Dr. Billy Helms, Dr. Max Hocutt, Dr. Richard Peck, Dr. Roger E. Sayers, Dr. James Taaffe and Dr. James D. Yarbrough. App. 17a

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Opinions Below

Review is sought of an affirmance by a court of appeals of a district judge's post trial set aside of a jury verdict in favor of a female college faculty professor who alleged retaliation for having complained of sex discrimination in pay and promotion against her department chairman. The Opinion of the United States Court of Appeals for the Eleventh Circuit issued on July 27, 1993 is reprinted at App 17a.

On December 10, 1993, the Court of Appeals denied the appellant's timely filed Petition for Reconsideration and Suggestion for Rehearing En Banc.

Jurisdiction

The order of the Court of Appeals denying the appellant, Kathleen Wu's, Petition for Reconsideration and Suggestion for Rehearing En Banc was denied on December 10, 1993. This Court's certiorari jurisdiction arises under 28 U.S.C. §§ 1254 (1) and 2101(c).

Constitutional and Statutory Provisions Involved

1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

2. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title. Section 704(a) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991. 42 U.S.C. §§ 2000e et seq.

3. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. First Amendment to the United States Constitution.

Statement of Facts

Overview of the litigation:

This petition arises from the trial by jury of claims by a college philosophy professor that her department chairman had engaged in a campaign of unlawful retaliation against the petitioner on account of her having previously complained about sex discrimination in pay and promotion. The petitioner filed suit claiming that the University of Alabama, some of its officials and her department chair in particular, were engaged in a campaign of retaliation in order to force her and her faculty husband's resignations from employment. The retaliation case was summarily dismissed, but overturned by a Court of Appeals which remanded the claims for jury trial. App. 1a, *Wu v Thomas,* 863 F2d 1543 (11th Cir. 1989)

After the completion of the jury trial, the plaintiff prevailed only on the claims against her department chairman by winning compensatory damages of $20,000 and punitive damages of $60,000 against him in his personal capacity. The jury tried the First and Fourteenth Amendment and Title VII claims (42 USC §§ 2000e et seq.) pursuant to 42 U.S.C. § 1983. Prior to the jury retiring, the district judge told the jurors that if they wanted to find for the plaintiff, they would have to write the reasons they found retaliation. They did. The district judge subsequently found those reasons to have been trivial and insufficient as a matter of law and found that the defendant was entitled to qualified immunity in that he could not have known that his non-economic retaliation was clearly a violation of established law. The Court of Appeals affirmed and denied reconsideration of its affirmance.

Trial Facts:

In 1980, Kathleen Wu first talked to the dean of the College of Arts and Sciences about salary differences that she thought were unfair to women faculty. Ultimately, she and other women received what the University of Alabama called "equalization money". Beginning in 1981 through 1984, she tried three times to gain promotion to the rank of professor and was denied each time. She unsuccessfully complained about discrimination in promotion and pay and has never been promoted since to the rank of professor.

In 1987, the petitioner filed EEOC complaints that she and her faculty husband were the victims of a campaign of retaliation for her having made the civil rights complaint about pay and promotion. She presented evidence that her working environment was hostile because of her having complained about unequal pay and sex discrimination in promotion. A jury was permitted only to determine the personal liability of individual University of Alabama administrators. At the time of the retaliation trial, Congress had not passed the Civil Rights Act of 1991 allowing for jury trial or damage awards in Title VII cases. The plaintiff was allowed a jury and allowed to pursue a damage claim against individual defendants in their personal capacity by enforcing the prohibitions of the First and Fourteenth Amendments and Title VII through 42 U.S.C. § 1983.

The plaintiff proved by a preponderance of the evidence that the defendant Hocutt, petitioner's department chairman, had intentionally and personally violated her protected free speech right to file an EEOC charge and lawsuit and proved that his ill treatment of her was substantially or completely motivated by his unlawful retaliatory intent. The jurors were instructed that this case was not about hostility or bad personality but about

unlawful retaliation. The jury was charged that to prevail the plaintiff must prove that defendant Hocutt had taken these retaliatory steps by deliberately making Dr. Wu's working conditions intolerable in an effort to force her to leave her job.

The jury was charged that they could not assess punitive damages unless they found that defendant Hocutt had unlawfully acted with malice or with willfulness or callous and reckless indifference to Kathleen Wu's rights. The jury assessed $20,000 in compensatory damages and $60,000 in punitive damages against Hocutt saying in their seven written findings required by the trial judge that (1) he had assigned her to a classroom with inadequate blackboard space, (2) he made a list of a baker's dozen ideas to discipline the petitioner, (3) he referred to her classes as dying, (4) he changed her textbook after her class was set up (5) he criticized her first lawsuit to other faculty members at their meetings and with secretaries, (6) called her dishonest with no proof and (7) damaged her reputation as a teacher and person. App. 19a, fn.1 The jury returned verdicts in favor of all other defendants.

The district judge then set aside the plaintiff's verdict saying that "[T]he seven specific acts listed are not contrary to established law. They do not evidence deprival of a constitutionally protected property interest. None of them deprived Dr. Wu of her tenured position or caused a loss of salary." App 38a. The district judge then decided that there was no direct evidence that some of the acts were done to harass Dr. Wu and that some of the actions that the jury found retaliatory had been appropriate actions for the defendant Hocutt to take against her and that other findings against Hocutt had not really caused Kathleen Wu damage.

The Eleventh Circuit panel in affirming the set aside of the plaintiff's verdict, found that qualified immunity barred the verdict saying:

So when Hocutt acted, a reasonable employer could not have known for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII. App. 23a

The appellate panel held that no case has clearly established that retaliatory harassment could violate Title VII where the employer caused the employee no tangible harm, such as loss of salary, benefits, or position. For this reason, the appellate court reasoned that qualified immunity barred any relief against defendant Hocutt.

BASIS FOR FEDERAL JURISDICTION

The petitioner is permitted to bring actions to enforce the First Amendment to the Constitution and 42 U.S.C. §§ 2000e *et seq.* through 42 U.S.C. § 1983 pursuant to 28 U.S.C. §1343.

Reasons for Granting the Writ

Contrary to First, Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits, the Eleventh Circuit Court of Appeals has held that qualified immunity protects a governmental official from personal liability for deliberate and intentional civil rights discrimination because the law has not been clearly established that unlawful employment retaliation can occur when the victim suffers only intangible economic harm. The Eleventh Circuit acknowledges that racial and sexual harassment is clearly actionable even if the victim has no tangible financial losses, but holds that retaliatory harassment has not been clearly prohibited unless the employer caused the employee tangible harm, such as loss of salary, benefits, or position.

The District of Columbia Circuit joins the Eleventh on this issue. This conflict in the circuits merits reconciliation by the Supreme Court.

I. Section 704(a) of Title VII of the Civil Right Act of 1964, as amended, clearly prohibits an employer's intentional non-economic retaliation through deliberate creation of a hostile environment for an employee who has previously claimed sex discrimination.

In 1986, this Court announced *Meritor Savings Bank v Vinson*, 477 US 57 (1986) making clear that Title VII of the Civil Rights Act of 1964 is "not limited to 'economic' or 'tangible' discrimination". While *Meritor Savings Bank* discussed violations of §2000e-2(a)(1), the case made clear that Congress intended to strike at the entire spectrum of employment discrimination, including requiring employees to work in a discriminatorily hostile or abusive environment. The principle of *Meritor Savings Bank* was

prefigured by *Los Angeles Dept. of Water and Power v Manhart*, 435 US 702, 707 (1978) and reinforced by *Harris v Forklift Systems, Inc.* 126 L.Ed 2d 295 (1993)

The only distinction between this case at bar and *Manhart, Meritor* and *Harris* is that this case is about "discrimination" for having opposed practices made unlawful employment practices by Title VII and discrimination on account of the petitioner's having made a charge, testified, assisted and participated in a hearing under Title VII. §704(a), 42 U.S.C. § 2000e-3a. While § 704(a) of the 1964 civil rights law is often referred to as the retaliation section, the word "retaliation" does not appear in the title as Congress chose to use the the verb "discriminate" throughout the legislation. The Eleventh Circuit has decided in 1993 that the anti-discrimination proscriptions that had been previously determined to prohibit all forms of discrimination covered by Title VII, including illegal conduct having non-economic manifestations, does not clearly prohibit an employer from discrimination under Section 704(a) by intentionally creating a hostile environment for a professor who had opposed sex discrimination.

Over a decade ago, the Eleventh Circuit held that job harassment is actionable if it is sufficiently severe or pervasive so as to alter the conditions of the victim's employment even though there is no loss of pay. *Henson v Dundee*, 682 F2d 897 (11th Cir. 1982) Now this case at bar makes the distinction that *Henson v Dundee* concerned discriminatory sexual harassment and not discriminatory retaliatory harassment.

In *Harris v Forklift, supra*, the concurring opinion of Justice Ginsburg notes that the considerations that distinguish race discrimination from sex discrimination (except in the rare case of a bona fide occupational qualification) do not alter the analysis of the proof of

discriminatory conduct. Analysis of considerations of discrimination for opposition conduct do not differ based on the employee's reaction to the opposition conduct although that may affect the relief awarded. That is to say, retaliatory conduct that would cause one employee to quit but which another employee could endure must be analyzed by the same proof standards. In the Eleventh Circuit, however, the same conduct may or may not be actionable depending on the victim's reaction or the ability of the employee to withstand the illegal behavior.

The Eleventh Circuit's opinion in this case engages in just that type of distinction-without-a-difference discussion of discrimination. The discussion, however, leads this Circuit to the conclusion that deliberate acts of discrimination in violation of § 704(a) of Title VII and the First Amendment are not clearly actionable because "a reasonable employer could not have known for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII." App. 23a.

The panel opinion explicitly rejects the concept that sexual and racial harassment cases settle the issue saying that racial, sexual and retaliatory acts arise from different factual contexts. Therefore, holdings under 42 U.S.C. § 2000e-2(a) do not clearly establish the law on Title VII's retaliation provision, section 2000e-3(a). The panel similarly expresses doubt about whether all three kinds of conduct are, in a legal sense, to be treated the same. App 21a - 22a, fn. 3.

This rationale revolves on the ability of the victim to withstand the hostile and abusive environment rather than the violations. In this case, the petitioner Kathleen Wu alleged and the jury was charged that the plaintiff contended that the pattern of conduct of the department chairman was deliberately designed to cause her to quit

her faculty position. By the conclusion of trial, she had not quit although the jury found she had suffered from her chairman's intentional and malicious retaliation. It is a disturbing anomaly that the Eleventh Circuit would hold that creation of an abusive environment which may violate § 704(a) of Title VII is not clearly wrong so long as the victim has not been made to suffer money losses.

Non-economic violations through harassment, changes in job duties and the like have been recognized for some time as actionable civil rights violations, and specifically Title VII violations by other circuits. *St. John v Employment Development Dept.*, 642 F2d 273 (9th Cir. 1981) (transfer of plaintiff from EEO unit to another job at the same pay and status constitutes retaliation for having filed an EEOC charge); *Rodriguez v Bd of Ed of Eastchester U. Free Sch.*, 620 F2d 362, 365 (2nd Cir. 1980) (overruling a lower court finding that a transfer of female faculty member from junior high school to elementary school was not actionable since the action sought to "assuage hurt feeling and injured pride"); *Jacobs v Martin Sweets Co.*, 550 F2d 364 (6th Cir. 1977) (no-change-in-hours-or-pay transfer to try to get employee to quit followed by resignation); *Collins v State of Ill.*, 830 F2d 692 (7th Cir. 1987); *Goodwin v Circuit Court of St. Louis County, Mo.*, 729 F2d 541 (8th Cir. 1984)

Kathleen Wu, the petitioner, also proved that the defendants had violated her free speech rights by this harassment of her for having complained of sex discrimination. While the panel opinion did not discuss the First Amendment enforcement through §1983, it affirmed the district judge's opinion which did. In this sense, the Eleventh Circuit's affirmance conflicts with other circuits on this issue, too. *Piver v Pender County Bd of Educ.*, 835 F2d 1076 (4th Cir. 1987); *Agosto-De-Feliciano v Aponte-Roque*, 889 F2d 1209 (1st Cir. 1989) (adopts hybrid test

unrelated to financial harm to determine if employee is in "reasonably inferior" position on account of speech); *Goodwin v Circuit Court of St. Louis County, Mo., supra.*

The Eleventh Circuit wrongly decided that there was no clearly established law that non-economic retaliation was prohibited by Title VII. This national fair employment law has served as the source for this court's repudiation of non-economic retaliation: In *Rutan v Republican Party of Illinois*, 497 US 62 (1990) at fn. 8 the Court stated:

> Our decision does not impose the Federal Judiciary's supervision on any state government activity that is otherwise immune. The federal courts have long been available for protesting unlawful state employment decisions. Under Title VII, 42 U.S.C. §§ 2000e(a) (f), and 2000e-2(a) (1982 ed.), it is a violation of federal law to discriminate in any way in state employment (excepting certain high-level positions) on the basis of race, color, religion, sex, or national origin. Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights.' 868 F2d, at 954, n.4.

II. Qualified Immunity Should Be Denied a Defendant Who Intentionally Harasses and Punishes an Employee for Having Complained of Sex Discrimination in Violation of the First Amendment.

While the Eleventh Circuit specifically declined to reach the unlawfulness of the defendant Hocutt's actions under Title VII, the panel did hold that qualified immunity

available to him through § 1983 barred recovery because:

> [W]e cannot find any case that clearly established that retaliatory harassment--as opposed to sexual or racial harassment--could violate Title VII where the employer caused the employee no tangible harm, such as loss of salary, benefits, or position. The statute itself says that an employer cannot 'discriminate' against a protected employee. That all hostile acts are wrongful is not plain from this language. Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an "adverse employment action" against an employee, see, *e.g. Whatley*, 632 F2d at 1328 we have never defined what this general phrase means. So when Hocutt acted, it was not clearly established that acts like his would violate Title VII. App 21a, 22a

This language constructs a qualified immunity standard for retaliation/harassment cases which cannot be overcome absent proof of factually specific retaliatory conduct which has been previously and clearly declared unlawful. That is to say, the Eleventh Circuit will require, where there is no loss of money, a showing that particular specific retaliatory conduct had been previously litigated and determined to be unlawful in order for a plaintiff to overcome a defense of qualified immunity even under the First Amendment. That an employee has been treated adversely because of filing a Title VII case or an EEOC charge would not be sufficient information to overcome an assertion of qualified immunity. Only with factually identical or perhaps similar retaliatory behavior memorialized in legal precedent, opines the Eleventh Circuit, would a reasonable defendant understand that his own retaliatory conduct is clearly unlawful. App 23a.

In First Amendment cases, this would be tantamount to having to litigate every various way in which a defendant might infringe on the constitutional guarantee before any government official could be held to having clear knowledge that his particular form of repression created personal liability. Qualified immunity, to be sure, is available to governmental defendants. *Harlow v Fitzgerald*, 457 U.S. 800 (1982) The immunity issue to be determined is whether a defendant could reasonably have thought his actions were consistent with the rights he is alleged to have violated.

An appellate court does not consider the correctness of the facts or determine even if a claim is stated when determining the applicability of qualified immunity. It is a question of legal norms. *Mitchell v Forsyth*, 472 US 511 (1985) Using the *Mitchell* standard, the petitioner would have survived and, indeed, did survive a summary judgment motion asserting a qualified immunity defense. *Wu v Thomas*, 863 F2d 1543 (11th Cir. 1989) She just could not survive the jury's explanation of the verdict in her favor which did not list any monetary losses as one of its seven reasons for finding in her favor.

The defendant Hocutt was charged with daily harassing the plaintiff through systematic exclusion of her from everyday activities of the Department of Philosophy, retaliatory discipline, and a pattern of overt and subtle behavior designed to cause her to leave the University. The jury was told by the district judge that they could not find for the plaintiff unless they listed their reasons, i.e. the jury was not given interrogatories as suggested by the opinion, but required to write their own explanations of retaliatory behavior from their recollection of the trial evidence.

The panel opinion, however, took the jury's list of seven incidents of retaliation against the petitioner and posed the query: were any of these seven listed acts, which were "short of firing, demoting or refusing to hire" known to be illegal. The panel concluded that even though they had already established that an employer cannot retaliate by taking "adverse employment action", that they had also "never defined what this general phrase means." App. 23a The panel did not take the opportunity in the instant case to define the phrase leaving governmental officials still pedagogically unenlightened, at least within the Eleventh Circuit. Hence, government officials, at least in this circuit, still do not know the legal contours of an employee's right to be free from retaliation for making complaints of sex discrimination other than there must be some financial losses.

The right not to suffer for having spoken out on a topic of public concern is protected by the First Amendment. In other circuits, unlike the Eleventh, this right does not hinge on money. Simply banning an employee from meetings, as is analogous to this case, will support an employee's claim against a public official. *Thomas v Carpenter*, 881 F2d 828 (9th Cir. 1989) *cert. denied*, 494 US 1028 (1990) Unlawful transfers made in violation of the First Amendment with no salary losses are prohibited in other circuits. *Hughes v Whitmer*, 714 F2d 1407 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); *Bowan v Pulaski County Special School Dist.*, 723 F2d 640 (8th Cir. 1983). *Contra*, *Mosrie v Barry*, 718 F2d 1151 (D. C. Cir. 1983) (constitutional claim must be accompanied by discharge from employment or demotion rank or pay)

The *Wu* panel does not assert that defendant Hocutt, or any reasonable government official, believed retaliation was permitted by law. The opinion just rescues from personal liability through § 1983 any governmental official

who retaliates in intangible ways. There is nothing, however, in Title VII itself, the First Amendment or the law of the Eleventh Circuit prior to this case, that would have allowed a defendant to believe that Title VII was to redress only financial harm. Indeed, until November 1991, when Title VII was amended again, there were no financial remedies whatsoever other than through equitable restitution of back pay. The statute was designed from 1964 to 1991 exclusively to address inequitable employment conduct through equitable relief. *Wade v Orange County Sheriff's Office*, 844 F2d 951 (2nd Cir. 1988); *Ward v Texas Employment Commissison*, 823 F2d 907 (5th Cir. 1987); *Sullivan v Pinellas County*, 773 F2d 1182 (11th Cir. 1985); *Lincoln v Board of Regents*, 697 F2d 928 (11th Cir. 1983) Never before had the Fifth or Eleventh Circuit held that Title VII only prohibited conduct causing financial losses. The Eleventh Circuit and this court have in fact historically and repeatedly used its injunctive powers to address the full range of discriminatory job assignments and discriminatory work barriers. *Griggs v Duke Power Co.*, 401 U.S. 424 (1971); *U.S. v H.K. Porter*, 491 F2d 1105 (5th Cir. 1974)

Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Anderson v Creighton*, 483 U.S. at 638 (1987) A defendant's subjective belief in the correctness or legality of his behavior is not relevant to the enjoyment of qualified immunity. *Herron v Bowyer*, 850 F2d 1543, 1546 (11th Cir. 1988) Consequently, the appropriate legal standard should have been whether a reasonable government administrator would have believed that implementing retaliatory employment decisions short of inflicting monetary losses was permitted by Title VII or the First Amendment. Prior to this decision in the Eleventh Circuit the answer would have been no. *Henson v Dundee, supra.*

There is tension between a district court's duty to determine the issue of qualified immunity as early as possible so as to avoid unnecessary litigation and the duty to allow a jury to determine if otherwise permissible employment decisions were motivated by unlawful retaliatory intent. Hiring, assigning, firing, transferring, promoting, disciplining employees, even ridiculing and generally making employees miserable can be the stuff of everyday life. It is only when those decisions are motivated by factors made unlawful by Congress, that federal concern is triggered.

Kathleen Wu, a Yale-trained logician, instructs students through mathematical-like problems sometimes 66 lines long which she writes on blackboards around the classroom. When Hocutt assigned her to a room outside of the philosophy department with a broken blackboard too small for use, the jury came to understand the effect that this had on her ability to teach. It was not trivial. She does not have a constitutional right to all the blackboard space she needs or to a blackboard at all. But she should have a right not to be deprived by her department chairman of basic teaching tools only because she had spoken up about sex discrimination at the University of Alabama.

When Dr. Wu was successful in proving that she had been subjected daily to a hostile environment that the defendant created for her only because she had voiced concern for herself and other women's employment situation, her harasser was not sandbagged by a new flag of legal theory flying over heretofore uncharted First Amendment territory. There simply is no case that has ever before suggested that a First Amendment right of free speech be conditioned on the complainant's financial losses. The cases are legion that protect the constitutional right without economic loss. *e.g. Procunier v Martinez*, 416 U.S.

396 (1974); *Stanley v Georgia*, 394 U.S. 557, 564 (1969); *Thomas v Collins*, 323 U.S. 516, 537 (1945); *Whitney v California*, 274 U.S. 354, 375 (1927)

When Hocutt made her workplace hostile and abusive, Kathleen Wu had a clearly established right to speak about sex discrimination on campus and to file an EEOC charge free from any penalty that he could impose on her through his offices and administrative position at the University of Alabama.

Conclusion

For the reasons set forth above, petitioner respectfully prays that this Court grant certiorari and reverse the judgment below.

Respectfully submitted,

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Dr. Kathleen Johnson WU and Dr. Hsiu Kwang Wu, Plaintiffs-Appellants,

v.

Dr. Joab THOMAS, in his official capacity as President of the University of Alabama; The Board of Trustees of the University of Alabama, a body corporate; Dr. Roger E. Sayers, individually and in his official capacity as Academic Vice-President of the University of Alabama; Dr. Richard Peck, individually and in his official capacity as Dean of the College of Arts & Sciences of the University of Alabama; Dr. Max Hocutt, individually and in his official capacity as chairperson of the Department of Philosophy of the University of Alabama; and Dr. John Formby, individually and in his official capacity as head of the Department of Finance, Economics, and Legal Studies of the University of Alabama, Defendants-Appellees.

No. 87-7653.

United States Court of Appeals,
Eleventh Circuit.

Jan. 23, 1989.

Husband and wife faculty members brought civil rights action against university claiming retaliation for wife's having filed a gender discrimination action. The United States District Court for the Northern District of Alabama, No. CV87-G-0501-W, J. Foy Guin, Jr., J., dismissed, and faculty members appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) faculty members had exhausted administrative remedies under Title VII; (2) complaint was not required to allege deprivation of property or liberty interests protected by the

Fourteenth Amendment; and (3) Eleventh Amendment does not bar suits for equitable relief against state officers in their official capacities nor preclude damages award against state officials in their individual capacities.

Reversed.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT and EDMONDSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

TJOFLAT, Circuit Judge.

I.

The appellants in this case, Kathleen and Hsiu Kwang (H.K.) Wu, are employed on the faculty at the University of Alabama. Kathleen Wu is an associate professor in the Department of Philosophy; H.K. Wu is a full professor of Finance and Economics.[1] Both Kathleen and H.K. Wu have tenure.

In 1980, Kathleen Wu began to complain that officials at the University of Alabama were discriminating against her because of her gender in matters concerning equal pay and opportunity for promotion. She eventually filed a charge with the United States Equal Employment

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* Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] Both H.K. and Kathleen Wu have doctorates in their respective fields. To avoid confusion and unnecessary verbiage, this opinion will refer to the appellants as Kathleen and H.K. Wu, or as Mr. and Ms. Wu.

Opportunity Commission (the EEOC); after exhausting her administrative remedies with the Commission, Ms. Wu brought an action in the United States District Court for the Northern District of Alabama against several of the university's officials. In that suit (*Wu I*), Ms. Wu sought relief under the Equal Pay Act of 1963, 29 U.S.C. § 206 (1982), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), and under 42 U.S.C. § 1983 (1982).[2]

According to H.K. Wu, subsequent to Kathleen Wu's filing of her EEOC charge he was summarily removed from the chairmanship of his department without cause, notice, or explanation. In November 1985, Dr. John Formby, the department's new chairman, invited Mr. Wu to look for work somewhere else. As a result of this action, Kathleen Wu filed a second charge with the EEOC on March 12, 1986, contending that Dr. Formby's treatment of her husband was in retaliation for her prosecution of *Wu I*.

The district court tried *Wu I* from March 31 to April 9, 1986. In October 1986, the district court held for the university officials. *See Wu v. Thomas*, No. 84-2159 (N.D.Ala. Oct. 24, 1986), *aff'd* 847 F.2d 1480 (11th Cir.1988). H.K. and Kathleen Wu allege in the instant case that following the district court's decision, several university officials continued to harass them.

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[2] Kathleen Wu's section 1983 claim was predicated on the university officials' alleged violations of the Equal Pay Act, Title VII, and the due process and equal protection clauses of the fourteenth amendment.

Specifically, H.K. Wu alleges that in August 1986, Dr. Formby again suggested that he look for another job. In addition, Mr. Wu alleges that university officials have denied him various important teaching assignments, removed him without notice from a Graduate Admissions Committee, and have given him pay raises lower than those received by comparable members of his department. These measures, he contends, have diminished his academic reputation, thus denying him opportunities outside the University of Alabama and causing him emotional distress.[3]

Kathleen Wu alleges that university officials have destroyed at least one favorable student evaluation of her performance, have entered inaccurate ratings of her performance on her permanent record, and have publicly threatened her for attempting to investigate this matter. Ms. Wu further alleges that university officials sought to force one of her former students to sign an affidavit implicating Ms. Wu in wrongdoing, and that she has been denied reasonable classroom facilities and compensation for approved professional expenses. University officials also have threatened to remove her from classes she traditionally has taught, have excluded her from vital departmental decisions, have called her a "trouble-making woman [who is] essentially dishonest," and have leveled other groundless charges at her. Ms. Wu contends that as a result of these incidents her reputation in the

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[3] We take these allegations from the affidavit of H.K. Wu, which was filed with the district court on June 26, 1987, before it made its final disposition in this case. We treat this affidavit as effectively amending Mr. Wu's original complaint.

academic community has suffered and she has experienced emotional distress.[4] These incidents led Ms. Wu to file a third retaliation charge with the EEOC.

On January 21, 1987, the EEOC issued a no cause determination and a right to sue letter on Ms. Wu's second EEOC charge. H.K. and Kathleen Wu then brought this suit, alleging that officials at the University of Alabama, the appellees, had violated 42 U.S.C. § 2000e (1982) by retaliating against H.K. and Kathleen Wu for bringing *Wu I*. They sought relief under that statute[5] and

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[4] Again, we take these allegations from the affidavit of Kathleen Wu, which was filed with the district court on June 26, 1987, before the court made its final disposition of this case. We treat this affidavit as effectively amending Ms. Wu's original complaint.

[5] 42 U.S.C. § 2000e-3(a) (1982) provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 2000e-3 clearly authorizes Ms. Wu's suit for any retaliation predicated on her Title VII claims in *Wu I*. In *Wu I*, Ms. Wu also alleged violations of the Equal Pay Act of 1963, 29 U.S.C. § 206 (1982). That Act has no retaliation provision. Appellants maintain, however, that they may remedy retaliatory action for the bringing of an Equal Pay Act suit under 42 U.S.C. § 2000e-3(a). No court apparently has addressed this issue. *But cf. Willner v. Budig*, 848 F.2d 1032, 1034 (10th Cir.1988) (claim for retaliation following Equal Pay Act suit presented but not addressed); *Equal Employment Opportunity Comm'n v. West Co.*, 40 Fair Emp.Prac.Cas. (BNA) 1024, 1025-26 (E.D.Pa.1986) [available on WESTLAW, 1986 WL 1239] (same); *Tuber v. Continental*

under 42 U.S.C. § 1983 (1982).[6]

In response to the appellants' complaint, the appellees filed an answer, labeled a "motion to dismiss," which denied that anyone connected with the university had retaliated against H.K. and Kathleen Wu, and which raised the affirmative defenses of res judicata, nonexhaustion of administrative remedies, and sovereign immunity. The district court, *sua sponte*, converted the appellees' answer to a motion for summary judgment, and on October 27, 1987 the court entered a final order

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Grain Co., 326 Fair Emp.Prac.Cas. (BNA) 933, 937 (S.D.N.Y.1984) [available on WESTLAW, 1984 WL 1326] (same); *Altman v. Stevens Fashion Fabrics*, 441 F.Supp. 1318, 1319 (N.D.Cal.1977) (same).

Section 2000e governs retaliation arising from "any practice made an unlawful employment practice by this section." Title VII provides the following definition of an unlawful employment practice:

> It shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1982). Thus, by the terms of section 2000e, employers are prohibited from retaliating for any action alleging sex discrimination, whether it was brought under Title VII or another act of Congress. We therefore conclude that the retaliation provisions of section 2000e encompass suits brought to remedy retaliatory action resulting from the prosecution of a claim under the Equal Pay Act.

[6] Section 1983 provides a remedy for the deprivation of rights secured by the Constitution and laws of the United States by any person acting under color of state law. In this case, H.K. and Kathleen Wu seek relief under section 1983 for the violation of 42 U.S.C. § 2000e. *See* discussion *infra* at II.C.

granting appellees summary judgment under Fed.R.Civ.P. 56. The appellants now challenge the district court's decision.

II.

The district court advanced four independent grounds for its award of summary judgment. We examine each ground separately.

A.

As its first ground for summary judgment, the district court concluded that the appellants "failed to comply with the jurisdictional prerequisites to suit pursuant to Title VII of the Civil Rights Act of 1964." Specifically, the district court first determined that Kathleen Wu's suit was barred because she had not yet requested or received a right to sue letter for her third EEOC charge. Second, the district court determined that H.K. Wu had no actionable claim because he had made no independent EEOC charge, and because "his suit [could not] rest on [Kathleen Wu's] filed charges with the EEOC."

This circuit has long required plaintiffs to exhaust their administrative remedies before bringing suit under Title VII. *See, e.g., Wheeler v. American Home Prods. Corp.*, 582 F.2d 891, 897 (5th Cir.1977)[7] ("It is clear that a single individual plaintiff in a civil action under Title VII must

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[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit, including Unit A, handed down prior to October 1, 1981.

satisfy two jurisdictional requisites: (1) a charge must have been filed with [the] EEOC and (2) the statutory notice must have been received from [the] EEOC.") We have refused, however, to demand such exhaustion in all situations, recognizing that literal compliance does not always effectuate the purpose of the requirement, which is to promote informal settlements. Thus, we have noted that "[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful[?]" *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir.1968).

One such area in which we have recognized that strict compliance with title VII is unnecessary is where the plaintiff has filed a charge with the EEOC, but in her judicial action the plaintiff raises related issues as to which no filing has been made. Thus, we have stated:

> As long as allegations in the judicial complaint and proof are "reasonably related" to charges in the administrative filing and "no material differences" between them exist, the court will entertain them. As we have noted . . . , "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."
>
> Judicial claims which serve to amplify, clarify, or more clearly focus earlier EEO complaints are appropriate. Allegations of new acts of discrimination, offered as the essential basis for the requested judicial review are not appropriate.

Ray v. Freeman, 626 F.2d 439, 443 (5th Cir.1980) (citation omitted) (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir.1970)).

Kathleen Wu's second EEOC charge, which the district court apparently overlooked, stated as follows:

> The University retaliated against me by [Dr. John Formby] calling my husband and suggesting that he would be happier teaching somewhere else. This was retaliation against me because (1) I have a discrimination suit pending against the University; (2) the University knows that if my husband took another job in a different city I would be likely to follow him because of our marital relationship.

We think that the allegations contained in Ms. Wu's complaint in the instant case are reasonably related to this charge, serving only to amplify the claim of retaliation with additional instances of wrongful retaliatory conduct on the part of university officials. Moreover, we question whether requiring a right to sue letter with regard to the third EEOC charge would serve any purpose – given the university's reaction to her previous charges, we hardly can expect that it suddenly will decide to avail itself of the good offices of the EEOC and reach an informal settlement with Kathleen and H.K. Wu. We therefore conclude that Ms. Wu's failure to receive a right to sue letter on her third EEOC charge is no obstacle to this suit.

A second situation in which this court has relaxed the filing requirement of Title VII arise when a non-filing party, such as Mr. Wu, wishes to "piggy-back" his judicial action on the claim of a party who followed the administrative requisites of the Act. Thus, we have allowed the

class in a title VII action to include similarly situated employees who failed to file EEOC charges. *See Oatis*, 398 F.2d at 499. Likewise, we have held that intervening plaintiffs need not have pursued the administrative requisites of Title VII. *See Wheeler*, 582 F.2d at 897-98. In *Crawford v. United States Steel Corp.*, 660 F.2d 663 (5th Cir. Unit B Nov. 1981),[8] this court concluded that the same policies behind the *Oatis* and *Wheeler* decisions compelled the same result in the case of co-plaintiffs who present essentially identical claims of discrimination:

> Analysis of the purpose behind the EEOC filing requirement and of the unique history of the litigation out of which this case arises also favors our conclusion. The purpose of the filing requirement is to insure "that the settlement of grievances be first attempted through the office of the EEOC." *Oatis*, 398 F.2d at 498. This purpose is not served in the present case by requiring each of the several plaintiffs to file essentially identical charges. *Id.* The settlement channels furnished by the filing requirement have been thoroughly exhausted with respect to these plaintiffs. . . . To dismiss the claims of one-third of the plaintiffs in this case because they failed to file EEOC charges is thus not only inconsistent with *Wheeler* and *Oatis* but also an unnecessarily harsh penalty for their failure to resort to settlement channels that were already filled with claims substantially similar to their own.

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[8] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

Crawford, 660 F.2d at 666. In allowing the "piggy-backing" of claims, we must look to see whether the plaintiffs are so "similarly situated" that the gravamen of their complaints are the same. *See id.* Given that Kathleen Wu's charge of retaliation is based on the university's actions toward her husband, this case presents an archetypal example of the situation in which multiple filings are unnecessary. We therefore conclude that H.K. Wu's claim also is properly before the court, despite his failure to file an individual charge with the EEOC. The district court erred in dismissing appellants' claims for nonexhaustion of administrative remedies.

B.

As its second basis for granting summary judgment, the district court determined that the Wu's suit was precluded by the court's previous decision in *Wu I*. In making this determination, the district court relied on a recent statement of the doctrines res judicata and collateral estoppel by this court:

> Plaintiff concedes that its present claim could have been included in the prior suit if it had been presented in a timely manner. Since it could have been presented as part of plaintiff's original [complaint] it must have been so presented or else be barred by res judicata. The rule obtains both in this circuit and in the state courts of Florida that final judgment by a court of competent jurisdiction bars a subsequent suit between the same parties and on the same cause of action not only as to all matters that were litigated in the first proceeding but also as to all issues that could have been litigated.

Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495, 1497 (11th Cir.1985). In reviewing the district court's decision, we focus on the requirement that the "same cause of action" be at issue in both suits.

In this case, the district court seems to have believed that the retaliation claims at issue in the present litigation were resolved by *Wu I*. We can find no basis for this belief. Neither the pleadings nor the pretrial order in *Wu I* show any indication that Kathleen Wu raised a retaliation claim. Appellees' counsel admitted this in oral argument before us, but maintained that because some of the testimony in *Wu I* touched on retaliatory actions taken by the university, Kathleen Wu should be deemed to have implicitly amended her complaint to include a claim of retaliation. We find counsel's argument to be completely devoid of merit. Kathleen Wu's first action did not raise a claim of retaliation; the principles of res judicata and collateral estoppel therefore do not bar appellants' claims, and the district court erred in so holding.

C.

Appellants allege in their complaint:

> that the defendants have violated the rights of the plaintiffs under [42] U.S.C. § 2000e and 42 U.S.C. § 1983 by unlawfully retaliating against plaintiffs because they have made a civil rights complaint against the defendants and because they have sought to enforce Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.

The district court concluded that appellants had not "alleged or proved injury to a property or liberty interest protected by the fourteenth amendment" and thus found a third basis for granting summary judgment. This disposition of the claim is entirely unresponsive: appellants' complaint pleads a cause of action under 42 U.S.C. § 2000e, not the fourteenth amendment.[9]

Section 2000e states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1982). Such a claim does not require that the employer actually have been engaged in an unlawful employment practice; rather, the plaintiff need only have had a "reasonable belief" that an unlawful employment practice was occurring. *See Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. Unit A Sept.1981). As applied to the facts of this case, then, it is irrelevant that Kathleen Wu lost her suit

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[9] Appellants did not invoke section 1983 to redress a fourteenth amendment violation. Section 1983 remedies deprivations of rights created by federal law as well as by the Constitution. *See Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980) ("[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."). By pleading section 1983, the appellants only seek the additional remedies that the section affords for the appellees' alleged violation of 42 U.S.C. § 2000e.

for sex discrimination in *Wu I*, so long as she had a reasonable belief that university officials were discriminating against her on the basis of sex. We conclude that appellants' section 2000e claim states a valid cause of action. The district court erred in concluding otherwise.

D.

This suit was brought against Dr. Joab Thomas, in his official capacity as President of the University of Alabama; the Board of Trustees of the University of Alabama; and several other university officials, both individually and in their official capacities. The appellants requested declaratory and injunctive relief against the Board of Trustees and the university officials sued in their official capacity. The appellants also requested compensatory damages. As its fourth reason for granting appellees' motion for summary judgment, the district court concluded that "all of the defendants are protected by the eleventh amendment doctrines of sovereign immunity and good faith immunity."

In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Supreme Court held that Congress has the power to abrogate the states' eleventh amendment immunity when it enacts legislation under section 5 of the fourteenth amendment:

> In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary

> within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. at 456, 96 S.Ct. at 2671 (footnote omitted). The Court went on to find that by a 1972 amendment to Title VII of the Civil Rights Act of 1964 that allowed private litigants to recover money damages from state governments, Congress intended to effect such a waiver of the states' eleventh amendment immunity. *Id.* at 457, 96 S.Ct. at 2672. Because appellants' claim under 42 U.S.C. § 2000e arises under Title VII of the 1964 Act, no eleventh amendment barrier exists. The district court erred in finding that the eleventh amendment barred appellants' cause of action under section 2000e.

The eleventh amendment continues to be an obstacle to actions brought under 42 U.S.C. § 1983. *See Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (reaffirming *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), which held that Congress did not intend section 1983 to create a waiver of eleventh amendment immunity). The eleventh amendment does not, however, bar suits for equitable relief against state officers in their official capacity, *see Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), nor does the amendment preclude a damages award against state officials in their individual capacity. *See Kentucky v. Graham*, 473 U.S.

159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Appellant's complaint distinguished between the appellees' individual and official capacities, and the district court should have construed the appellants' prayer for relief to conform to this long accepted practice. The district court erred in dismissing appellant's claims on the basis of sovereign immunity.

III.

We vacate the judgment of the district court, and remand this case for further proceedings.

VACATED and REMANDED.

Dr. Kathleen Johnson WU, Dr. Hsiu-Kwang Wu, Plaintiffs-Appellants,

v.

Joab THOMAS, University of Alabama Board of Trustees, a body corporate, Roger E. Sayers, individually and in his official capacity as President of the University of Alabama, Dr. Richard Peck, individually, Max Hocutt, individually and in his official capacity as chairperson of the Department of Philosophy of the University of Alabama, Dr. John Formby, individually, Dr. James Yarbrough, in his official capacity as Dean of the College of Arts and Sciences of the University of Alabama, Dr. James G. Taaffe, in his official capacity as Academic Vice President of the University of Alabama, Dr. Billy Helms, in his official capacity as head of the Department of Finance, Economics and Legal Studies of the University of Alabama, Defendants-Appellants,

John Bickley, Michael Putnam, Movants.

No. 91-7538.

United States Court of Appeals,
Eleventh Circuit.

July 27, 1993.

Married faculty members brought civil rights action against university, claiming wife was retaliated against for filing sex discrimination action. The United States District Court for the Northern District of Alabama, No. CV-87-G-00501-W, J. Foy Guin, Jr., J., dismissed action, and appeal was taken. The Court of Appeals, 863 F.2d 1543, vacated and remanded. On remand, the District Court entered judgment in favor of defendants, and faculty members again appealed. The Court of Appeals held that: (1) university official's harassment of professor in

retaliation for bringing Title VII claim did not clearly violate Title VII, entitling official to qualified immunity on professor's Title VII retaliation claim; (2) judge's status as adjunct professor and his past contributions to university did not require his recusal; and (3) professor did not suffer lost wages when university barred him from teaching summer class, as required to support professor's retaliation claim.

Affirmed.

Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

This case involves a Title VII retaliation claim. We affirm the grant of judgment notwithstanding the verdict ("JNOV").

Plaintiffs H.K. Wu and Kathleen Johnson Wu are professors at the University of Alabama ("University"). In 1984, Kathleen Wu sued the University and certain individuals for sex discrimination. District Judge Guin held a bench trial and found for the defendants on the merits. We affirmed. *Wu v. Thomas*, No. 84-2159 (N.D.Ala. Oct. 24, 1986), *aff'd*, 847 F.2d 1480 (11th Cir.1988) ("*Wu I*"), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 156 (1989).

In 1987, plaintiffs filed this suit, alleging that defendants violated 42 U.S.C. § 2000-e, 42 U.S.C. § 1983, and

the first and fourteenth amendments by retaliating against the Wus for bringing *Wu I*. Judge Guin granted defendants summary judgment, but we reversed and remanded for trial. *Wu v. Thomas*, 863 F.2d 1543 (11th Cir.1989) ("*Wu II*"). On remand, the jury ruled for each defendant except Hocutt, against whom they awarded $20,000 in compensatory damages and $60,000 in punitive damages to Kathleen Wu. The district court granted Hocutt's motion for JNOV or, alternatively, a new trial. Plaintiffs appeal.

I. JNOV

The first question is whether the district court properly granted JNOV to Hocutt. Over plaintiffs' objection, the district court made the jury fill out written interrogatories. Asked to list the ways, if any, that Hocutt retaliated against Kathleen Wu, the jury listed seven acts.[1] The district court granted JNOV on the basis that these acts involved no constitutionally protected interests and were contrary to no established law.

To obtain damages under section 1983 for a due process violation, a plaintiff must show the denial of a protected property or liberty interest. Absent discharge, or loss of income or rank, injury to reputation is no

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[1] The jury specifically found that Hocutt assigned Kathleen Wu a classroom with inadequate blackboard space; wrote a list of "bankers [sic] dozen ideas" to discipline Kathleen Wu; referred to her classes as dying; changed her textbook after her class was set up; criticized her lawsuit in front of faculty members and secretaries; called her dishonest with no proof; and damaged her reputation as teacher and a person.

protected interest. *Oladinde v. Birmingham*, 963 F.2d 1481, 1486 (11th Cir.1992). The district court properly concluded that none of the jury's findings involved the denial of constitutionally protected interests.

But plaintiffs relied on more than the fourteenth amendment. They also sought damages under section 1983 for a Title VII violation. 42 U.S.C. § 2000e-3(a) prohibits discriminating against an employee for pursuing Title VII claims.[2] Earlier in this case, we held that plaintiffs might recover under section 1983 if they proved a violation of this Title VII provision. *See Wu II*, 863 F.2d at 1549 & n. 9.

Defendants argue that, even if plaintiffs could recover for a Title VII violation, JNOV was still proper because Hocutt was entitled to qualified immunity. Qualified immunity is no defense to a Title VII action. But defendants could assert qualified immunity once plaintiffs tried to recover damages under section 1983 for the alleged Title VII violation. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

To defeat a qualified immunity defense, plaintiffs bear a burden that cannot be met by relying on sweeping legal propositions. *See Barts v. Joyner*, 865 F.2d 1187, 1190

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[2] 42 U.S.C. § 2000e-3(a) (1982) says:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this subchapter.

(11th Cir.1989). "General propositions have little to do with the concept of qualified immunity." *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir.1987). Plaintiffs must show the law establishes the contours of a right clearly enough that a "reasonable official would understand that what he is doing" is unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

When Hocutt acted, it was clearly established that harassment based on an employee's race or gender could violate Title VII, even if the harassment involved no loss of money or position. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir.1971). Our cases also clearly established that no employer could fire, demote, refuse to hire, or otherwise tangibly injure an employee for pursuing a Title VII action. *See, e.g., Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir.1980) (retaliatory discharge); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir.1980) (retaliatory refusal to promote); *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir.1975) (retaliatory refusal to hire), *overruled on other grounds, Burdine v. Texas Dep't of Community Affairs*, 647 F.2d 513 (5th Cir.1981)

But plaintiffs do not cite and we cannot find any case that clearly established that retaliatory harassment – as opposed to sexual or racial harassment – could violate Title VII where the employer caused the employee no tangible harm, such as loss of salary, benefits, or position.[3] The statute

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[3] In some retaliation cases, we have encountered claims that an employer harassed an employee but caused the

itself says that an employer cannot "discriminate" against a protected employee. That all hostile acts are wrongful is not

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employee no economic harm. But, because we disposed of each of these cases on other grounds, none establish the proposition that every unkind act, even those without economic consequences, can violate Title VII. *See, e.g., Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir.1988) (because irreparable harm is presumed in Title VII cases, trial court erred in refusing to hold hearing to decide if preliminary injunction against retaliatory acts was justified); *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir.1988) (no retaliation established because no evidence supported finding that employer's acts harmed employee); *Bailey v. USX Corp.*, 850 F.2d 1506, 1508 (11th Cir.1988) (no retaliation established where bad reference caused no injury and was legitimately motivated); *McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir.1986) (no retaliation established where employer rescheduled work week, but had legitimate reason); *McCarthney v. Griffin-Spalding County Bd. of Educ.*, 791 F.2d 1549, 1553 (11th Cir.1986) (no retaliation established where employer met with employee to discuss Title VII charges, but had legitimate reasons); *Hamilton v. General Motors Corp.*, 606 F.2d 576, 580 (5th Cir.1979) (injunction unjustified where plaintiff failed to prove he was given harder assignments).

We have also considered claims that the plaintiff was harassed *and* ultimately fired or transferred. *See, e.g., Thompkins v. Morris Brown College*, 752 F.2d 558, 565-66 (11th Cir.1985) (remanding claim that plaintiff was harassed and then fired because trial court's findings were insufficient); *Hamm v. Board of Regents*, 708 F.2d 647, 653 (11th Cir.1983) (no retaliation established where employer reprimanded and then transferred plaintiff, but had legitimate reason for doing so); *Farshy v. Kagan*, 585 F.2d 749 (5th Cir.1978) (no retaliation established where plaintiff claimed he was harassed and then fired, but employer had legitimate reasons for its actions). Again, none of these cases clearly establish, for section 1983 purposes, that every slight triggered by an employee's earlier employment discrimination claim is unlawful.

plain from this language. Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an "adverse employment action" against an employee, *see, e.g., Whatley*, 632 F.2d at 1328, we have never defined what this general phrase means. So, when Hocutt acted, a reasonable employer could not have known for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII.[4]

We hold only that, when Hocutt acted, it was not clearly established that acts like his would violate Title VII. We do *not* hold that Hocutt's acts were lawful under Title VII; because of qualified immunity, we do not reach this second issue. The district court properly granted JNOV to Hocutt.[5]

Nor do the sexual and racial harassment cases settle the issue. Cases such as *Rogers* and *Vinson* interpret Title VII's racial and sexual discrimination provision, 42 U.S.C. § 2000e-2(a); their holdings cannot clearly establish the law on Title VII's retaliation provision, section 2000e-3(a). And, given the different factual contexts in which racial, sexual, and retaliatory acts arise, reasonable doubt exists whether all three kinds of conduct are, in a legal sense, to be treated the same for all purposes.

[4] That other circuits have had to decide what hostile acts do or do not constitute unlawful retaliation shows the issue is not frivolous. *See, e.g., Collins v. Illinois*, 830 F.2d 692, 702-04 & n.7-10 (7th Cir.1987) (discussing whether lateral transfer that results in no loss of pay or benefits can be an "adverse employment action").

[5] Plaintiffs argue the grant of JNOV was procedurally improper because the district court relied on an issue not raised in defendants' motions for directed verdict. The record does not support this claim.

II. Recusal

Plaintiffs argue Judge Guin should have recused himself under 28 U.S.C. § 455[6] because he has ties to the University, and because he allegedly prejudged plaintiffs' claims.[7] We review for abuse of discretion. *See Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir.1975).

Judge Guin's closest ties to the University are his status as an adjunct professor and his past contributions

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[6] 28 U.S.C. § 455(a) says:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Under 28 U.S.C. § 455(b), recusal is also required where a judge:

> (1) . . . has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .
>
> (4) . . . knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interests that could be substantially affected by the outcome of the proceeding.

[7] Plaintiffs' motion specifically alleged that recusal was required under 28 U.S.C. § 455(a) & (b) because: Judge Guin is listed in Who's Who and a University catalog as an adjunct University professor; Judge Guin plans to create a scholarship at the University; Judge Guin is a University football fan who has annually given $600 to the University for priority football tickets; all of Judge Guin's University ties are with the Tuscaloosa campus where both plaintiffs teach; Judge Guin recused himself in another case because of his University connections; and Judge Guin said before trial that he thought the EEOC would have rejected H.K. Wu's claims. On appeal, plaintiffs point to several more of Judge Guin's comments and rulings that allegedly show that Judge Guin was biased against them. They claim, for instance, that Judge Guin described plaintiffs as "unpleasant" and "litigious" people.

to the University. In denying plaintiffs' recusal motion, Judge Guin noted that he receives no salary as an adjunct professor and that his duties are limited to letting law students intern in federal court and judicial chambers for one semester. He also wrote that he has not donated money to the University for many years.

On these facts (which are uncontested), no reasonable observer would assume that Judge Guin had extra-judicial knowledge of this case or otherwise question Judge Guin's impartiality. So, none of Judge Guin's University connections disqualified him under section 455(a). *See United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir.1987) (judge's "background and associations" do not justify recusal); *Levitt v. University of Texas*, 847 F.2d 221 (5th Cir.1988) (school ties insufficient to disqualify judge); *McCann v. Communications Design Corp.*, 775 F.Supp. 1535, 1543-44 (D.Conn.1991) (same); *cf. Easley v. University of Michigan*, 853 F.2d 1351, 1356-68 (6th Cir.1988) (recusal required where reasonable observer might believe judge learned about case through extensive school ties); *Liljeberg v. Health Sucs. Acquisition Corp.*, 486 U.S. 847, 864-68, 108 S.Ct. 2194, 2205-06, 100 L.Ed.2d 855 (1988) (recusal required where judge was school trustee). And, plaintiffs point to no financial or other substantially affected interests that would disqualify Judge Guin under section 455(b)(4).

Bias under section 455 must be extrajudicial. *United States v. Meester*, 762 F.2d 867, 884-5 (11th Cir.1985). Taken in context, none of the statements and rulings cited by plaintiffs reflect extra-judicial bias. At most, plaintiffs' claims of personal bias rest on "unsupported, irrational, or tenuous allegations" about Judge Guin's views of

plaintiffs. *Giles v. Garwood*, 853 F.2d 876, 878 (11th Cir.1988). The district court did not abuse its discretion in denying plaintiffs' motion for recusal.

III. H.K. Wu's Claims

Plaintiffs argue the district court improperly refused to let H.K. Wu testify that, in 1981, he spoke to the University president about foreign-born faculty. They claim the 1981 speech was another reason why defendants retaliated against them. We review the district court's evidentiary decisions for abuse of discretion. *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir.1983).

Plaintiffs' complaint, as amended, alleged defendants retaliated against the Wus because of *Wu I*. Plaintiffs did not introduce the 1981 speech as a basis for retaliation until they clarified their claims for a pretrial order. In that order, the district court took note of the new allegations about the 1981 speech, but added that the complaint would control the scope of plaintiffs' claims. Testimony on the 1981 speech was irrelevant to anything pled in the complaint and was therefore properly excluded.

Plaintiffs also say the district court improperly granted directed verdict on two of H.K. Wu's claims. H.K. Wu testified that he was told his faculty chair had a deficit and that he was barred from teaching a certain summer class in 1987. The district court then told the jury it could not award damages for the faculty chair remarks, nor could it award damages for lost wages based on the 1987 summer teaching incident.

Undisputed evidence showed that, although H.K. Wu was not allowed to teach one summer 1987 class, he could have taught other classes for the same pay. It was also undisputed that the University makes up deficits in H.K. Wu's faculty chair and that H.K. Wu was assured that the University would continue to do so. No reasonable juror could conclude the 1987 summer teaching incident resulted in lost wages or that the chair incident caused plaintiffs financial or emotional damages.[8]

IV. Denial of Leave to Amend

Plaintiffs also say the district court improperly refused to let them amend their complaint to add defendant Joab Thomas in his individual capacity. We lack jurisdiction to review this claim because the notice of appeal, even construed liberally, gives no indication that plaintiffs intended to raise this issue. *See Osterneck v. E.T. Barwich Indus. Inc.*, 825 F.2d 1521, 1528 (11th Cir.1987), *aff'd*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989).

AFFIRMED.

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[8] Plaintiffs also argue that defendants never moved for directed verdict on either the faculty chair or summer teaching claims. But defendants did argue in their directed verdict motions the evidence was insufficient to show emotional or financial damages on plaintiffs' claims. The district court's ruling on these points was thus procedurally proper.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7538

DR. KATHLEEN JOHNSON WU,
DR. HSIU-KWANG WU,

Plaintiffs-Appellants,

versus

JOAB THOMAS, UNIVERSITY OF ALABAMA BOARD OF TRUSTEES, a body corporate, ROGER E. SAYERS, individually and in his official capacity as President of the University of Alabama, DR. RICHARD PECK, individually, MAX HOCUTT, individually and in his official capacity as chairperson of the Department of Philosophy of the University of Alabama, DR. JOHN FORMBY, individually, DR. JAMES YARBROUGH, in his official capacity as Dean of the College of Arts and Sciences of the University of Alabama, DR. JAMES G. TAAFFE, in his official capacity as Academic Vice President of the University of Alabama, DR. BILLY HELMS, in his official capacity as head of the Department of Finance, Economics and Legal Studies of the University of Alabama,

Defendants-Appellees,

JOHN BICKLEY,
MICHAEL PUTMAN,

Movants.

On Appeal from the United States District Court for the Northern District of Alabama

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(Filed DEC 10 1993)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

DR. KATHLEEN JOHNSON WU; and DR. HSIU-KWANG WU,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate; DR. ROGER E. SAYERS, individually and in his official capacity as President of the University of Alabama; DR. JAMES G. TAAFFE, in his official capacity as Academic Vice President of the University of Alabama; DR. RICHARD PECK, individually; DR. JAMES YARBROUGH, in his official capacity) as Dean of the College of Arts and Sciences of the University of Alabama; DR. MAX HOCUTT, individually and in his official capacity as chairperson of the Department of Philosophy of the University of Alabama; and DR. JOHN FORMBY, individually; DR. BILLY HELMS, in his official capacity as head of the Department of Finance, Economics and Legal Studies of the University of Alabama,

Defendants.

CIVIL ACTION
NO. 87-G-0501-W

(Filed
Feb 22 1991)

MEMORANDUM OPINION

Following trial both plaintiffs and defendant Max Hocutt filed post-trial motions. The motions were set for hearing on November 14, 1990, at which time the court heard arguments of counsel on the motions of defendant Max Hocutt. Written arguments and the applicable law were the basis for decision on the other motions.

Oral argument was unnecessary in reaching a decision on plaintiff Kathleen Wu's motion for judgment notwithstanding the verdict. At no time during the trial did her counsel move for a directed verdict pursuant to Fed. R. Civ. P. 50.

Even had there not been a procedural basis for denial of the motion the court would not have ruled favorably upon it. Other than Wu's statement that defendant Peck discriminated against her in the selection of the interim chair in the Philosophy Department, plaintiff failed to prove it. Dr. Peck testified he selected the acting chairman from recommendations submitted. Kathleen Wu's name was not on the list. His selection had nothing to do with Dr. Kathleen Wu's charges against the University and was not based on retaliatory reasons. Counsel failed to cross examine Dr. Peck on this issue. The court is of the opinion his uncontroverted testimony was credible. Kathleen Wu's motion for judgment notwithstanding the verdict is due to be denied.

Dr. H. K. Wu has based his motion for a new trial on several grounds. Paragraph 1 of the motion claims the court improperly excluded evidence at trial that he spoke out on behalf of foreign born faculty and improperly excluded from jury consideration claims occurring prior

to June 1983. Plaintiff, however, failed to plead his involvement with foreign born faculty in the complaint or in the amended complaint. The pretrial order specifically states in bold print, under plaintiffs' positions, the following: **"Note: Anything ambiguous will be ruled by the complaint. It is not the intention of the court to amend the complaint by this order. The complaint controls."**

By order of October 8, 1990, the court ruled that "**for purposes of liability** the statute of limitations precludes any claims accruing prior to June 1983. It does not preclude the introduction of evidence concerning events that occurred outside the statute of limitations for other purposes." The order is consistent with the wording of the complaint and amended complaint.

Paragraph 2 of the motion claims the court "improperly excluded evidence of the plaintiff which could show that the defendants did not adhere to the rules, policies and standards of the defendant University of Alabama while simultaneously allowing the defendants to defend against him by asserting their compliance with the defendant University of Alabama's rules, policies and standards." Trial of the *Wu* case involves jury and nonjury issues. The jury portion of the case was against four individual defendants: Roger Sayers, Richard Peck, Max Hocutt and John Formby. The evidence counsel offered to introduce did not involve interaction between any of the four named defendants and either Kathleen or H. K. Wu. Even though the court would not allow this possibly prejudicial material to be introduced against the four individual defendants, the record clearly shows the court informed counsel she would be able to introduce such

evidence against the University during the nonjury portion of the trial.[1]

In paragraph 3 plaintiff H. K. Wu claims the "Court improperly commented in front of the jury on its opinion of the evidence offered by H. K. Wu causing the jury to believe that the Court had concluded that his claims regarding his treatment as a chairholder of the Lee Bidgood Chair were without merit." The court fails to understand how a lawyer could expect damages for telling Dr. Wu there was a deficit in his chair. The university always supplied,the funds and always paid him. The court's comments that the **source** of the funds supporting Dr. Wu's chair and position was of no practical difference to H. K. Wu was within the discretionary power of the court. Dr. Wu was not damaged by the existence of the

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[1] Counsel was offering the excluded evidence to prove that the University did not adhere to its own rules and regulations. The University was a defendant in the severed portion of the trial, not a defendant in the trial against the four individuals. At the trial in which the University is a defendant the evidence will be admissible to show a lack of due process for the University's failure to follow its own rules and regulations. The evidence was not proffered to show that the four individuals failed to follow their own rules and regulations. It was not appropriate to allow testimony in rebuttal before admission of the testimony which was to be rebutted.

Plaintiff attempted to show the *University* did not follow its own rules, etc. (apparently a lack of due process claim). This was not admissible against the individual defendants (what the *University* failed to do). Counsel *apparently* offered evidence of what the *University* did – not the individual defendants. The court did *not* rule out evidence offered in rebuttal of this defense, if offered at the proper time.

deficit. It was true that there was a deficit, but the University always made it up. The "comment" actually was an instruction that this deficit complaint was not an issue for the jury and could not be a basis for an award of damages. The instruction was correct and legally sound.

The plaintiff, in paragraph 4, claims the court "improperly instructed the jury that they could find no legal violation whatsoever for H. K. Wu's claim that he was cut off from teaching graduate students in summer school." The evidence showed that Dr. Wu refused to teach anything but the course he wanted to teach. It was within the discretionary power of the court to instruct the jury accordingly. The specific charge given is as follows:

> Dr. H. K. Wu testified that during the summer of 1987 he had no opportunity to teach at the University of Alabama. Because he wanted to teach on his own terms he refused to apply. The court hereby instructs you that because he refused to apply other than on his own terms you may not award Dr. H. K. Wu monetary damages for lost wages for the summer of 1987.

Paragraph 5 of the motion claims the court conducted the "questioning of Roger Sayers in an adversarial manner for the benefit of this defendant and the effect of this questioning prejudiced the plaintiff's opportunity for a fair jury trial." Because plaintiff's counsel was unable to conduct her examination in a manner conducive to eliciting the facts necessary for the jury to reach a decision it was necessary for the court to question the witness to obtain factual information. The questioning was within the discretionary power of the court. H. K. Wu was not prejudiced by the court's actions.

There is no merit to plaintiff's claim in paragraph 6 of the motion that the "court improperly instructed the jury that they could find no violation for ill treatment for personality clashes where that defense was never raised by any defendant and was not tried during the three week trial in October 1990." It was obvious from their demeanor that the plaintiffs and the defendants did not like each other. It was obvious, too, from the testimony and evidence presented. It would have been improper for the jury to be swayed by these feelings. The law does not require them to like each other. It does require that they not allow their personal likes or dislikes to infringe on legal rights of others. Numerous witnesses for the defendants testified that any conflicts between the Wus and the defendants were the result of personal differences only. It was proper for the court to instruct the jury that personality clashes do not amount to retaliation under the law.

Plaintiff's last paragraph to the motion claims that the use of written interrogatories to the jury "deprived the jury of notice at the outset of the case of the burden imposed on them by the Court and deprived the jury of an opportunity to make a record of those findings as the evidence was presented to them during the trial." This charge is nonsense. At the beginning of the trial the court instructed the jurors to listen carefully and impressed upon them the importance of their job. Each juror was furnished a pad and pen to take notes during the trial. If any juror failed to make record of findings as the trial progressed it was because he chose not to do so. Rather than imposing a burden upon the jurors, the interrogatories aided them in reaching a verdict. The interrogatories

were properly presented to the jury at the close of all arguments.

Dr. H. K. Wu's motion for a new trial is denied.

Paragraph 7 of Dr. H. K. Wu's motion objects to the use of interrogatories. The answers to the those interrogatories form the basis for Max Hocutt's motions for judgment notwithstanding the verdict, a new trial, a vacation of the judgment, and a remittitur.

The jury found for the plaintiff Kathleen Johnson Wu and against defendant Max Hocutt. The second interrogatory and answer read as follows:

> If you find from a preponderance of the evidence that defendant MAX HOCUTT retaliated against KATHLEEN JOHNSON WU either for filing an EEOC charge and suit for discrimination or for exercising her right of free speech concerning alleged sex discrimination against women at the University of Alabama, list the ways in which he retaliated against her.
>
> 1. He assigned a classroom with inadequate blackboard space.
> 2. He wrote a list of bankers [sic] dozen ideas to discipline K. Wu.
> 3. He referred to her classes as dying.
> 4. Textbook changed after class was set up.
> 5. Criticism of her lawsuit in front of faculty members at meetings and secretaries.
> 6. Called her dishonest with no proof.
> 7. Damaged her reputation as a teacher and a person.

The seven specific acts listed are not contrary to established law. They do not evidence deprival of a constitutionally protected property interest. None of them deprived Dr. Wu of her tenured position or caused a loss of salary. Generally speaking, in each instance Dr. Hocutt was either responding to the dean or answering questions honestly when asked to do so by plaintiff Kathleen Wu or her attorney. The court will address each of the seven items individually.

Assignment of a classroom with inadequate blackboard space does not justify a plaintiff's verdict. There was no direct evidence this was done to harass Dr. Wu, and the lack of required space was remedied by means of a portable blackboard as soon as she voiced a complaint to Dr. Scott Hestevold, acting chairman of the department. The evidence does show, however, that at the time of classroom change the university was refurbishing classrooms in the philosophy department, making it necessary for the philosophy department to borrow space from the history department. Regardless, assignment of classroom space is discretionary with the department head. It does not rise to a constitutional deprivation. Even if it did Dr. Hocutt was in Scotland at the time on sabbatical leave and cannot be held accountable for the actions of Dr. Hestevold, the acting department chairman.

Dr. Hocutt's infamous "banker's dozen" list for disciplining Dr. Kathleen Wu was written in response to an inquiry from Dean Richard Peck after Dr. Wu refused to go meet with the dean. The dean meant to discipline her for refusal to obey college policy on the confidentiality of student/teacher evaluations. Of the thirteen suggestions the only discipline Dr. Wu received was a formal letter of

reprimand from Dr. Peck, not Dr. Hocutt. Neither the list nor the letter was published. The list was obtained through discovery. It is the opinion of the court Dr. Wu deserved at least a letter of reprimand for refusing to meet with the dean. Any lesser discipline would have been no discipline at all. The mere fact that the list exists is not a basis for damages. She proved no damage resulting from the mere existence of the unpublished list, no matter how inappropriate some of the listed suggestions might have been. The only suggestion acted on was entirely appropriate.

The jury found that Dr. Hocutt referred to Dr. Wu's classes as dying. The comment was made in his report to the dean's office on the state of the department and his recommendations, as Chairman, concerning merit raises. The class enrollment data, introduced into evidence primarily in Faculty Activity reports, shows a significant drop in the enrollment of Dr. Wu's introductory level classes. It further shows the enrollment in her introductory classes to be less than the enrollments in introductory classes taught by other faculty members. As chairman of the department it was Dr. Hocutt's responsibility to keep a check on size of classes in the department and the courses taught therein. A statement with a factual basis which in any event did not damage the plaintiff does not warrant monetary damages against Dr. Hocutt. The jury held against the plaintiff on her merit raise claim, and it is obvious that this unpublished comment could not possibly have damaged her in any other way.

While having to change textbooks in the middle of the semester might have been an inconvenience for the

students and for Dr. Wu, the change certainly should not have come as a surprise to her and is not sufficient reason to grant Dr. Wu damages. The evidence from both Dr. Wu and Dr. Hocutt showed that Dr. Hocutt contacted Dr. Wu about a syllabus for her spring 1988 course prior to the beginning of the term. Dr. Hocutt testified, without contradiction, that he asked her to develop further the content of the second half of the course and to supplement her textbook with other materials.[2] She did not do so. While Dr. Wu obviously disagreed with Dr. Hocutt on the textbook to be used, the ultimate decision rested with him as head of the department. Had she followed Dr. Hocutt's instruction the change of text in the middle of the semester would have been unnecessary. The natural result of her insubordination cannot be a basis for damages.

The filing of a lawsuit opens one to both criticism and praise. Dr. Hocutt would naturally resent being sued. The first amendment affords him the opportunity to express his resentment at being named a defendant and state his opinion of said suit as long as his speech does not infringe upon the rights of others. There is no evidence that Dr. Hocutt's speech infringed upon Dr. Wu's rights or harmed her. The record is void of evidence to support the finding that Dr. Hocutt criticized Dr. Wu's first lawsuit in front of faculty members at meetings and

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[2] Were it necessary to substantiate Dr. Hocutt's uncontradicted opinion that the text was inadequate without supplementation, Dr. Clark, who testified on behalf of Dr. Wu, acknowledged he had had to supplement her text when he used it.

in front of secretaries. Neither Mary McElroy Moody nor Peggy Murphy, the two departmental secretaries, testified she heard Dr. Hocutt criticize Dr. Wu. While Dr. Hestevold testified Dr. Hocutt had referred to Dr. Wu in uncomplimentary terms in front of faculty members, there was no testimony that he criticized her for bringing suit. There was no substantial testimony that any criticism resulted in damage. Dr. Rowlands, a member of the philosophy department, testified he first heard about the suit from a member of the history department, indicating the suit had not been previously discussed in departmental meetings.

Dr. Hocutt did not like Dr. Wu, but he did not transform this dislike into discrimination. His dislike did not affect her job in substantive ways: pay, reimbursement for travel expenses, class assignments. The jury found for him on those claims.

The jury found that Dr. Hocutt called Dr. Wu "dishonest" without proof. The evidence showed that the only time Dr. Hocutt expressed this belief was in response to questions posed by Dr. Wu or her attorney. His answers did not amount to calling Dr. Wu dishonest in retaliation for filing suit. Dr. Wu asked him why he believed the secretary's version of an altercation instead of hers. During deposition Dr. Wu's counsel asked his opinion of her honesty. He did not publish the opinion. When Dr. Wu talked with Dr. Hocutt about the altercation, however, she waived any claim based on that publication, if indeed that amounted to a publication. Dr. Wu was not damaged by Dr. Hocutt's remarks. The only damage stemming from the remarks came from the repeated references to his remarks by plaintiff's counsel

who failed to mention that the remarks were not improperly spoken. Dr. Hocutt was seriously damaged by these prejudicial references as shown by the jury finding.

The evidence showed Dr. Hocutt had reason to doubt Dr. Wu's honesty. Both he and Dr. Wu knew she had taped conversations without permission to do so and without the knowledge of those persons being taped. Dr. Wu admitted having hidden a tape recorder in a book bag or purse and having a recorder attached to her telephone. While she claimed her actions were for record keeping purposes, those tapings were sufficient to cast doubt on her honesty. The evidence further showed that Dr. Wu had discussed student evaluations with students when she knew they were supposed to be anonymous. These discussions prompted a reprimand by Dean Peck.

Although Dr. Hocutt had reason to doubt Dr. Wu's honesty he did not publish his beliefs or voice them until asked by her and her attorney. Whatever his thoughts, they are not actionable at law. Under the circumstances, there was no compensable harm or injury to Dr. Wu's reputation because of his statements.

The record is void of any evidence that Dr. Hocutt damaged Dr. Wu's reputation as a teacher and person. Not one witness testified that his opinion of her was affected by Dr. Hocutt. There was no evidence that Dr. Wu had sought other employment or been refused other employment because of damage inflicted by Dr. Hocutt. The only reputation evidence was given by witnesses called by the plaintiff. That evidence was complimentary. Absent evidence proving damage to her reputation there

is no justification for an award of damages against Dr. Hocutt on this theory.

Dr. Hocutt moved for a directed verdict pursuant to Rule 50 Fed. R. Civ. P. at the close of plaintiff's case and at the close of the evidence, and thereby complied with the procedural prerequisite for filing a motion for judgment notwithstanding the verdict. The court holds that for the reasons given the motion of Dr. Max Hocutt for judgment notwithstanding the verdict is to be granted, there being no factual basis for the verdict. The plaintiff will have to live with and adjust to the personality conflict which exists between her and Dr. Hocutt.

Alternatively, the court holds that the defendant's motion for a new trial be granted if the court of appeals does not fully affirm the granting of judgment notwithstanding the verdict. It is the opinion of the court that the jury would not have returned a verdict against Dr. Hocutt on any of the seven items were it not for the highly prejudicial conduct of plaintiff's counsel. The record is replete with examples of counsel's attempts to introduce improper evidence. Counsel repeatedly referred to the testimony in Wu I by Dr. Bas Van Frassen and tried to put that prior testimony before the jury. Although the court sustained the objections to those references and prior testimony, counsel continued to offer Dr. Van Frassen's testimony through the end of plaintiffs' rebuttal case.

Plaintiff's lack of knowledge of the Federal Rules of Evidence or indifference to them resulted in the court's sustaining numerous objections by counsel for the defense. Counsel refused to heed the court's admonitions not to try to introduce evidence against the University of

Alabama during the trial of the four individual defendants. To the jury it might appear the defendants' counsel or the court or both were trying to keep evidence out which the jury had a right to hear.

Most damaging to the defendant, however, were counsel's prejudicial questions dealing with Dr. Hocutt's belief in God, questions violative of Fed. R. Evid. 610 set forth below:

> Evidence of the beliefs or opinions on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Counsel began her questioning of the witness Hocutt by asking him if he was a moral relativist. When the objection to the question was sustained counsel asked the witness if he believed in God. When the ensuing objection was sustained counsel commented, "Your Honor, he took an oath." It is difficult for the court to believe that after twenty five years of practicing law counsel would be ignorant of the ban on this type of questioning or comment. Its plain purpose was to bias the jury against Dr. Hocutt, and it did.[3] There was no substantive basis for

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[3] The jury was drawn from 31 North Alabama counties. The undersigned judge has lived in this district 67 years and knows that such a question – which was clearly intended to show, even if unanswered, that the witness was an atheist – would necessarily do serious prejudice to that witness in the eyes of the jury. This is especially true when the witness is a party. The natural effect of an objection to such a question is to create a presumption in the minds of the jury that, indeed, the witness does not believe in God.

the verdict returned. Defendant Hocutt deserves a new trial without the taint of prejudicial inferences and material. *See United States v. Kalaydjian*, 784 F.2d 53, 56 (2d Cir. 1986) (Rule 610 prohibits any inquiry into religious beliefs.); *Contemporary Mission, Inc. v. Bonded Mailings, Inc.*, 671 F.2d 81, 84 (2d Cir. 1982) (inquiry into genuineness of witness's church affiliation properly excluded by trial court because of potential prejudicial effect); *United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980) (Simply to **question** a witness's belief in God is all that is necessary to cross over the line of what is permissible). *See also* McCormick, Evidence § 48 (1954) ("the disclosure of atheism or agnosticism, or of affiliation with some strange or unpopular sect, will often in many communities be fraught with intense prejudice."); 3A Wigmore, Evidence § 936 (Chadbourn Rev. 1970).

After plaintiffs' counsel assured the court that Caroline Plath was a rebuttal witness, the court allowed her to be called. Rather than rebuttal testimony, however, she reiterated previous irrelevant testimony. Counsel knew that Dr. Hocutt would not have been allowed to take the stand after Ms. Plath's testimony.[4] Even so, in closing remarks counsel referred to Ms. Plath's testimony and commented, "Hocutt didn't even take the stand to deny it."

The Northern District of Alabama is in the heart of the Bible belt. Atheism is not popular with the public in this district. The only possible reason for the question, and the only possible result, was undue prejudice.

[4] He had already testified to the contrary.

The court granted the defendants' motion to instruct plaintiffs' counsel to cease from using prejudicial and unsupported statements in her questions.[5] Counsel ignored the court's ruling and continued her questions and remarks. Her repetitive improper remarks and questions were bound to prejudice the jury. She further prejudiced the jury by constantly offering evidence of what the *University* did or failed to do, when the only defendants then on trial were the four individual defendants. She continued this for thirteen trial days, constantly trying to tar the individual defendants with a brush dipped in alleged misconduct of the University, *not* of the individual defendants. This was done after constant adverse rulings and instruction from the court not to do so. The purpose was obvious – to prejudice the jury. The court is of the opinion that this purpose was achieved.

For the above stated reasons it is the opinion of the court that defendant Hocutt is entitled to a new trial on the issues not affirmed by the court of appeals if it does not uphold the judgment notwithstanding the verdict.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE this 22nd day of February 1991.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

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[5] Counsel's statements and questions to witnesses, all in front of the jury, were to the effect that the defendants were trying to get rid of the plaintiffs, to run them off, to force them to leave, etc.

Supreme Court, U.S.
FILED
MAR 25 1994
OFFICE OF THE CLERK

No. 93-1370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DR. KATHLEEN JOHNSON WU,
Petitioner,
v.
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate; DR. E. ROGER SAYERS, individually and in his official capacity; DR. JAMES G. TAAFFE, in his official capacity; DR. RICHARD PECK; DR. JAMES YARBROUGH, in his official capacity; DR. MAX HOCUTT, individually and in his official capacity; DR. JOHN FORMBY; and DR. BILLY HELMS, in his official capacity,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DR. KATHLEEN JOHNSON WU,
Petitioner,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate; DR. E. ROGER SAYERS, individually and in his official capacity; DR. JAMES G. TAAFFE, in his official capacity; DR. RICHARD PECK; DR. JAMES YARBROUGH, in his official capacity; DR. MAX HOCUTT, individually and in his official capacity; DR. JOHN FORMBY; and DR. BILLY HELMS, in his official capacity,

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QUESTION PRESENTED

Whether a public official's actions, which had not been found to be in violation of Title VII or the First Amendment of the United States Constitution under clearly established law at the time the actions were taken, are protected by the doctrine of qualified immunity from claims pursuant to 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING IN THE ELEVENTH CIRCUIT COURT OF APPEALS

Plaintiffs-appellants in the Eleventh Circuit Court of Appeals were Dr. Kathleen Johnson Wu and Dr. Hsiu Kwang Wu. Defendants-appellees were The Board of Trustees of The University of Alabama, a body corporate[1] ; Dr. E. Roger Sayers, individually and in his official capacity as President of the University of Alabama; Dr. James G. Taaffe, in his official capacity as Academic Vice-President of the University of Alabama; Dr. Richard Peck, individually; Dr. James Yarbrough, in his official capacity as Dean of the College of Arts and Sciences of the University of Alabama; Dr. Max Hocutt, individually and in his official capacity as chairperson of the Department of Philosophy of the University of Alabama; Dr. John Formby, individually; and Dr. Billy Helms, in his official capacity as head of the Department of Finance, Economics, and Legal Studies of the University of Alabama.

[1] The Board of Trustees of The University of Alabama is a public corporation and has no parent companies or nonwholly-owned subsidiaries.

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OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the District Court for the Northern District of Alabama, entered February 22, 1991, is reprinted at page 31a of plaintiff's Petition for Writ of Certiorari. The Eleventh Circuit Court of Appeals' affirmance of this opinion appears at 996 F.2d 271 (11th Cir. 1993), and its denial of reconsideration or rehearing *en banc* appears at 11 F.3d 169 (11th Cir. 1993).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . 42 U.S.C. § 1983.

2. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a).

3. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances. U.S. Const. amend. I.

STATEMENT OF THE CASE

A. History of the Litigation

In 1985, Kathleen Wu filed suit against the University of Alabama and certain of its officials. She alleged that she was a victim of sex discrimination, as manifested by the failure of her attempts to be promoted to the rank of full professor, her relative lower pay, and her general treatment by the defendants. Her claims were based on Title VII, the Equal Pay Act, and the Fourteenth Amendment.

The United States District Court for the Northern District of Alabama, after a trial on the merits, found against Kathleen Wu on all issues. *Wu v. Thomas*, CV-84-G-2159-W (N.D. Ala. Oct. 24, 1986). She appealed to the Eleventh Circuit Court of Appeals, which affirmed in all respects. *Wu v. Thomas*, 847 F.2d 1480 (11th Cir. 1988). Plaintiff's petition for certiorari was denied. *Wu v. Board of Trustees*, 490 U.S. 1006 (1989).

In 1987, Kathleen Wu and her husband H.K. Wu filed this action, in which they claimed that they had suffered retaliation for Kathleen Wu's earlier sex discrimination claims. The court granted defendants summary judgment, *Wu v. Thomas*, CV-87-G-0501-W (N.D. Ala., Oct. 20, 1987), which was vacated and the case remanded by the Eleventh Circuit. *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), *reh'g denied*, 871 F.2d 122 (11th Cir. 1989). The Eleventh Circuit noted that plaintiffs were seeking to enforce Title VII through the operation of section 1983. 863 F.2d at 1549 n.9.

Upon remand, because the case predated the Civil Rights Act of 1991, the trial court bifurcated the trial into jury and non-jury issues. The first part of the trial, addressing issues to be submitted to a jury, was held before a jury and lasted thirteen days. The jury's verdict, as reflected in written jury interrogatories, was in favor of all the individual defendants except for Max Hocutt. The jury cited seven acts that they believed Max Hocutt had committed in retaliation against Kathleen Wu. The trial court judge granted a JNOV in favor of Max Hocutt and against Kathleen Wu, and denied JNOVs in favor of Kathleen and H.K. Wu and against the other individual defendants. *Wu v. Board of Trustees*, CV-87-G-0501-W (N.D. Ala. Feb. 22, 1991).

Plaintiffs appealed to the Eleventh Circuit Court of Appeals seeking review of the trial judge's grant of a JNOV in favor of Max Hocutt and against Kathleen Wu; of the trial judge's refusal to recuse himself; of the trial judge's instructions to the jury removing from their consideration certain of the claims of H.K. Wu; and of the trial judge's denial of plaintiffs' motion to amend their complaint to add Joab Thomas as a defendant. The Eleventh Circuit affirmed the trial court on all counts. *Wu v. Thomas*, 996 F.2d 271 (11th Cir. 1993). Plaintiffs requested a reconsideration or rehearing *en banc*, which was denied by the Eleventh Circuit. *Wu v. Thomas*, 11 F.3d 169 (11th Cir. 1993). Plaintiff now seeks review of the Eleventh Circuit Court of Appeals' affirmance of the trial court's having granted a JNOV in favor of Max Hocutt and against Kathleen Wu.

B. Facts Related to the JNOV Granted by the Trial Court

The jury returned a verdict in favor of Kathleen Wu and against defendant Hocutt, her department chair, and assessed $20,000 in compensatory damages and $60,000 in punitive damages. The district court judge had given the jury a written set of special interrogatories and special verdicts, on which the jury was to indicate whether they believed any retaliatory action had been taken, and if so what that action was. They were instructed to use the back of the page if there was not enough room on the front of the page to list all the acts that they found. After hearing numerous claims involving issues in relation to which Kathleen Wu, allegedly, suffered monetary harm, including salary, raises, reimbursement, and travel, the jury rejected those claims and focused only on seven specific acts that they believed had been retaliatory. The jury found that Hocutt had retaliated against Kathleen Wu in the following ways:

1. He assigned a classroom with inadequate blackboard space.
2. He wrote a list of bankers [sic] dozen ideas to discipline K. Wu.
3. He referred to her classes as dying.
4. Textbook changed after class was set up.
5. Criticism of her lawsuit in front of faculty members at meetings and secretaries.
6. Called her dishonest with no proof.

7. Damaged her reputation as a teacher and person.

Wu v. Board of Trustees, CV-87-G-0501-W, slip op. at 7 (N.D. Ala. Feb. 22, 1991).

In its order granting JNOV, the trial court stated,

> The seven specific acts listed are not contrary to established law. They do not evidence deprival of a constitutionally protected property interest. None of them deprived Dr. Wu of her tenured position or caused a loss of salary. Generally speaking, in each instance Dr. Hocutt was either responding to the dean or answering questions honestly when asked to do so by plaintiff Kathleen Wu or her attorney.

Id. at 7-8.

The court then went on to address each of the seven acts that the jury had cited in support of their verdict in favor of Dr. Kathleen Wu and against Dr. Hocutt. In each case, after a lengthy review of the evidence that had been presented during the trial, the court pointed out why the evidence related to that particular act could not support a judgment against Dr. Hocutt. At the conclusion of this review, the court held "that for the reasons given the motion of Dr. Max Hocutt for judgment notwithstanding the verdict is to be granted, there being no factual basis for the verdict." *Id.* at 13.

ARGUMENT

A. The Acts that the Jury Found Dr. Hocutt Had Committed in Retaliation Against Kathleen Wu Are Protected Under the Doctrine of Qualified Immunity

As one of the grounds for granting a JNOV, the trial court judge found that the seven specific acts listed by the jurors were not contrary to established law. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court established the rule that a government official performing discretionary functions is protected from personal liability based on actions within the scope of his or her position, as long as the actions taken do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This test was later clarified in *Anderson v. Creighton*, 483 U.S. 635 (1987), in which this Court recognized that "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. As the Court explained:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. . . . But if the test of "clearly established law" were to be

> applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Id. at 639.

Thus, in light of *Anderson*, it is not enough simply to say that the *prohibition against retaliation* is "clearly established." Rather, the plaintiff here is required to show that clearly established law prohibits a department chair from assigning classrooms, responding to his dean's request for disciplinary suggestions, informing the dean's office about the status of departmental courses and salary recommendations, attempting to improve the quality of courses in the department, exercising his First Amendment rights, and responding honestly to questions. Obviously, these activities do not rise to the level of "clearly" illegal acts, and plaintiff does not cite anything that would have enabled a "reasonable person" to believe that these acts were violative of Title VII.

Through an over-broad categorization of cases in other circuits, however, plaintiff has attempted to create an illusory conflict among the circuits on this issue. Plaintiff attempts to divide retaliatory acts into only two

wide-ranging groups: those acts causing economic harm and those causing non-economic harm. Then, by citing cases in which a specific form of non-economic harm has been held to be clearly violative of Title VII, plaintiff attempts to extend the reach of that analysis to cover *all* cases involving any type of non-economic harm. The cases cited by plaintiff as supporting the "clear illegality" of non-economic retaliatory acts, however, all involve either an involuntary transfer from one job to another or a distinct change in job duties. *Agosto-De-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Collins v. Illinois*, 830 F.2d 692 (7th Cir. 1987); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987); *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir. 1984); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); *St. John v. Employment Development Dept.*, 642 F.2d 273 (9th Cir. 1981); *Rodriguez v. Bd. of Educ.*, 620 F.2d 362 (2nd Cir. 1980); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977).

None of the seven acts cited by the jury, however, even assuming *arguendo* that there was sufficient evidence to support them, begins to approximate a job transfer or a change in job duties. Nowhere did the jury, or the plaintiff, for that matter, suggest that as a result of Max Hocutt's actions, Kathleen Wu ceased to be assigned to teach the same university-level philosophy courses at the University of Alabama that she had been teaching before she first complained about her situation.

By using such a broad level of generality, plaintiff is applying precisely the sort of analysis that the *Anderson* court criticized as improper. Whether *any* act with non-economic consequences has been held to clearly violate Title VII is not the issue; the Court below properly considered whether the seven specific acts cited by the jury met that criterion. Both the trial court and the Eleventh Circuit found they did not.

The only other citation referred to by plaintiff in support of her claim that the acts found by the jury were clearly illegal is a footnote to an opinion issued by this Court in a case arising from the Seventh Circuit and decided *after* all of the acts in the jury's list were supposed to have taken place. *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990). As this Court explained in *Anderson*, for public officials' acts to lose the protection of qualified immunity, "in light of *pre-existing law* the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 *(emphasis added)*. The inquiry focuses on the information possessed by the official *at the time the conduct occurred*. *Id.* at 641. Thus, even if the dictum found in the footnote of *Rutan* could be said clearly to establish the illegality of a trivial act after June 1990, there is no argument that such illegality was clearly established in the Eleventh Circuit at the time the acts listed by the jury are supposed to have been taken.[1]

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[1] Because plaintiff seems to place such stock in this dictum found in *Rutan*, it may be useful to look at the footnote's background. The Supreme Court's footnote cites to a footnote in the Seventh Circuit opinion below. *Rutan v. Republican Party*, 868 F.2d 943, 954 n.4 (7th Cir. 1989). The Seventh Circuit footnote, likewise cited to an earlier Seventh Circuit case, *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). In that earlier case, however, the Seventh Circuit had made it quite clear

Although plaintiff seeks to equate Max Hocutt's acts, as found by the jury, with hostile environment sexual harassment by invoking *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift System, Inc.*, _____ U.S. _____, 114 S. Ct. 367 (1993); and *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982), she does not cite to a single case in support of the proposition that the analysis appropriate to sexual harassment cases is interchangeable with that used in retaliation cases. By their nature, sexual harassment cases are extremely fact-specific and do not easily translate into the retaliation area. Moreover, the difference in the elements required to be proven for the two claims highlights the vast differences between the analyses appropriate to the two types of claims.

Finally, the cases cited by plaintiff in support of her proposition, that violations of the First Amendment need not involve financial loss, are entirely inapposite. *Procunier v. Martinez*, 416 U.S. 396 (1974) involved the

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that it was not holding that failure to have a birthday party is actionable under Title VII. In that case the defendant was alleged to have orchestrated a campaign of harassment against the plaintiff, including having held her up to ridicule for bringing a birthday cake for another employee. In commenting on that, the court recognized that such a complaint contained "a certain air of the ridiculous." *Id.* at 625. The court went on to note "even in the field of constitutional torts *de mininis non curat lex*. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. . . ." *Id.* Indeed, what the Seventh Circuit Court of Appeals actually did in *Bart v. Telford* was to remand to district court a determination of whether the totality of the "campaign" of harassment had, in fact, reached a threshold of actionability under section 1983.

Procunier v. Martinez, 416 U.S. 396 (1974) involved the permissibility of censoring prison inmates' mail and limiting their contact with attorneys; *Stanley v. Georgia*, 394 U.S. 557 (1969) involved a question of the illegality of possessing obscene materials; *Thomas v. Collins*, 323 U.S. 516 (1945) involved the rights of labor unions to organize workers; and *Whitney v. California*, 274 U.S. 357 (1927) involved the application of criminal statutes to members of the Socialist party. What these cases establish is simply that it is a violation of the First Amendment to abridge the freedom of speech. This analysis simply begs the question posed by *Anderson*. It is the burden of plaintiff to show that the specific way in which free speech was allegedly abridged was clearly illegal.

B. The District Court's Grant of JNOV Was Also Based on Other Grounds, Not Challenged Here

The Court of Appeals based its affirmance on an analysis of Hocutt's right to qualified immunity in the case. The district court had interpreted language in a footnote to the Eleventh Circuit's reversal of its earlier summary judgment order as requiring the trial court to permit plaintiffs to seek damages under section 1983 for the alleged violation of Title VII[2]; for that reason,

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[2] Although the Eleventh Circuit's footnote pointed out that appellants were seeking the additional remedies provided by section 1983, over and above those available under Title VII (this case predates the Civil Rights Act of 1991), that court did not offer any opinion about the correctness of plaintiffs' attempted expansion of section 1983 coverage. The trial court interpreted this footnote as an instruction to grant plaintiffs a jury trial on their Title VII claims against the individual defendants. The issue of whether such an interpretation was correct, in view of the wealth of

qualified immunity became available to defendants. If damages are sought under section 1983, the defenses to 1983 are also applicable.

The Eleventh Circuit Court of Appeals affirmed the district court order in its entirety. As noted earlier, the trial court granted defendants JNOV not only because Dr. Hocutt was protected by the doctrine of qualified immunity, but also because the trial judge found there was "no factual basis for the verdict." For each of the seven acts listed by the jury on their interrogatory forms, the court found as a matter of law that there was no legally sufficient evidentiary basis for the jury's findings. The Eleventh Circuit Court of Appeals did not disturb the district court's finding that Max Hocutt was entitled to a JNOV on more than one basis, and plaintiff has not raised that as an issue in her Petition for Writ of Certiorari.

Even if this Court were to find that qualified immunity was not an appropriate ground for granting the JNOV in favor of Max Hocutt, the trial court's order would still stand, based on the lack of evidence. Plaintiff's Petition asks for review only of the correctness of the qualified immunity defense under the facts presented. It is well-established that for purposes

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precedent in opposition, was raised during oral argument before the Eleventh Circuit, but was not addressed by the Eleventh Circuit in its opinion.

If the Court should grant plaintiff's Writ, respondents respectfully suggest that a meaningful review of this decision cannot be made without including the underlying premise of trial below--the use of 42 U.S.C. § 1983 to enforce Title VII rights--within the scope of the writ.

of judicial economy, the Supreme Court does not address issues not raised in the Petition for Writ of Certiorari. *Parke v. Raley,* _____ U.S. _____, 113 S. Ct. 517, 523 (1992). Thus, even were this Petition granted, and the Eleventh Circuit's reasoning on the issues raised in the Petition reversed, the results of the litigation would not change. The district court's granting of JNOV based on lack of evidence to support the charges has not been questioned by the Eleventh Circuit and is not questioned before this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully request this Court to deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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